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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-177

ALEJANDRO GARCIA

and

MICHAEL LEHMANN,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

OPPOSITION

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INDEX

Page

SUBJECT INDEX

Question Presented 1

Statute Involved 2

Counter-Statement of the Case 2

A Petitioner Garcia 2

B Petitioner Lehmann 3

Reasons for Denying the Writ 4

Conclusion 7

CASES CITED

Arnett v. *Kennedy* (1974), 416 U.S. 134 6-7
Broadrick v. *Oklahoma* (1973), 413 U.S. 601 6
California v. *LaRue* (1972), 409 U.S. 109 5
Chaplinsky v. *New Hampshire* (1942), 315 U.S. 568 4-5
Cherry v. *State* (1973), 18 Md. App. 252, 306 A. 2d 634 4
Cohen v. *California* (1971), 403 U.S. 15 5
Colten v. *Kentucky* (1972), 407 U.S. 104 6
Erzonznik v. *City of Jacksonville* (1975), —— U.S. ——, 45 L. Ed. 2d 125 5
Miller v. *California* (1973), 413 U.S. 15 5
Parker v. *Levy* (1974), 417 U.S. 733 6
Riley v. *United States* (1972), 298 A. 2d 228, cert. denied (1973), 414 U.S. 840 4
Silva v. *Municipal Court for Oakland-Piedmont Jud. Dist.* (1974), 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 4
United States v. *Mazurie* (1975), 419 U.S. 544.... 6

DISTRICT OF COLUMBIA CODE, 1973, CITED

Section 22-1112(a) 2

INDEX—Continued

Page

RULE OF COURT CITED

Rules of the Supreme Court of the United States, Rule 19 4

OTHER AUTHORITY CITED

Chafee, *Freedom of Speech* (1920) 5

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the holdings of the District of Columbia Court of Appeals (1) that congressionally enacted language prohibiting a "lewd, obscene and indecent sexual proposal" in public is neither unconstitutionally vague nor overbroad, and (2) that a sodomy solicitation addressed in public to a particular person does not enjoy

First Amendment protection warrant Supreme Court review.

STATUTE INVOLVED

District of Columbia Code, 1973 Edition:

§ 22-1112, *Lewd, indecent, or obscene acts.*

"(a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than $300 fine, or imprisonment for not more than ninety days, or both, for each and every such offense."

COUNTER-STATEMENT OF THE CASE

By informations filed in the Criminal Division of the District of Columbia Superior Court, petitioners were charged with making a "lewd, obscene and indecent sexual proposal," in violation of D.C. Code, 1973, § 22-1112(a). Petitioners moved to dismiss the informations claiming that the statutory language under which they were charged was unconstitutionally vague and overbroad. (App. 1a-2a.) For purposes of a pretrial hearing on the motions to dismiss only, petitioners stipulated to the facts as represented by the police reports (Form 163) prepared by the arresting officer (App. 2a). The substance of these reports, as amplified by the officer's testimony at the pretrial hearing, is as follows:

(A) Petitioner Garcia

At about 10:20 p.m., on April 17, 1974, Officer Andrews, a plainclothes officer assigned to the Prostitution and Perversion Branch of the Metropolitan Police Department's Morals Division, while standing at the corner of 14th and K Streets, N.W., was approached by petitioner Garcia who asked the officer to join him in looking at some movies up the street. The officer at first declined the invitation, but after some urging by Garcia, followed him to a nearby bookstore which contained coin-operated movie machines. The two men engaged separate machines. Later, after the officer had engaged another machine at Garcia's suggestion, Garcia "tried to climb in behind [the officer], hunching [him]—at [him]," but was told by the officer to stop. Garcia then asked where the officer was staying and, after being told that it was at the Ambassador Hotel, asked if the two of them could go to the officer's room there. The officer agreed. As the two were entering the lobby of the hotel, the officer asked Garcia "what he wanted to do." Garcia replied that "he wanted to suck [him] up" or "suck [him] off" and shortly thereafter was arrested. (App. 2a-3a.)

(B) Petitioner Lehmann

On April 18, 1974, at about 9:10 p.m., petitioner Lehmann approached plainclothes Officer Andrews as he was walking north in the 400 block of 11th Street, N.W., and asked him how he "was doing" and where he was staying. The officer indicated he was staying at the Harrington Hotel across the street. Lehmann then asked if the two of them could go to the officer's room, and when asked why, Lehmann replied that "he wanted to suck and fuck" the officer. Lehmann was then arrested. (App. 3a-4a.)

Following the pretrial hearing, the court entered an order dismissing the informations. Respondent appealed the order to the District of Columbia Court of Appeals. In reversing (335 A. 2d 217), the District of Columbia Court of Appeals held that the solicitations to commit sodomy attributed to petitioners were not protected by the First Amendment and that the challenged statutory

language was neither unconstitutionally vague nor overbroad. Under the court's limiting construction of that language, it proscribes only solicitations addressed to a particular person in public "to commit sodomy, indecent exposure, or, in the case of sexual proposals addressed to children, to perform some sexual act * * *" (App. 6a, 9a-10a). Petitioners thereafter filed in this Court a petition for a writ of certiorari and now request this Court to review the decision of the District of Columbia Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioners advance no grounds for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. The holdings of the District of Columbia Court of Appeals that a proposal or solicitation to commit sodomy openly and publicly made to a particular person is not protected by the First Amendment and that the applicable statutory language is neither unconstitutionally vague nor overbroad conflict with no decision of this Court and are fully consistent with constitutional principles enunciated by this Court.

First, in claiming that a face-to-face sodomy solicitation made in public presents a substantial First Amendment issue [1] which this Court should resolve, petitioners fail to distinguish between, on the one hand, speech relating to the communication or expression of ideas and, on the other hand, verbal acts soliciting criminal conduct. The latter plainly do not enjoy First Amendment protection. *Chaplinsky* v. *New Hampshire*, 315

[1] Lower courts, relying on this Court's decisions, have recently rejected similar claims. See *Riley* v. *United States*, 298 A.2d 228 (1972), cert. denied, 414 U.S. 840 (1973); *Cherry* v. *State*, 18 Md. App. 252, 306 A.2d 634 (1973); *Silva* v. *Municipal Court for Oakland-Piedmont Jud. Dist.*, 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 (1974).

U.S. 568, 574 (1942); Chafee, *Freedom of Speech* (1920), at 173. Compare *Cohen* v. *California*, 403 U.S. 15 (1971), upon which petitioners rely. Even when expression and literary works are involved, a patently offensive representation of an ultimate sexual act of a perverted nature such as sodomy is a "plain example" of the hard core conduct that may be prohibited by a statute, either as written or authoritatively construed, without running afoul of the First Amendment. See *Miller* v. *California*, 413 U.S. 15, 25-26 (1973). Of course, a legislative body has ever greater leeway "* * * as the mode of expression moves from the printed page to the commission of public acts that may themselves violate penal statutes * * *." *California* v. *LaRue*, 409 U.S. 109, 117 (1972). That being so, a publicly committed verbal act constituting a direct solicitation for sodomy simply cannot be equated with constitutionally protected expression. Just as "scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work * * * and in this respect * * * [are] distinguishable [in terms of First Amendment protection] from the kind of public nudity traditionally subject to indecent exposure laws * * *" (*Erzonznik* v. *City of Jacksonville*, —— U.S. ——, 45 L. Ed. 2d 125, 132, at n. 7), "advocacy of sodomy as socially beneficial and solicitation to commit sodomy" are likewise "entirely distinguishable * * * in terms of the First Amendment freedom of speech" (App. 12a). The holding of the District of Columbia Court of Appeals that the latter "is not protected speech," when openly and publicly engaged in as charged here, simply does not rise to a level of importance sufficient to warrant this Court's review.

Second, the contention that this Court should exercise its certiorari jurisdiction to decide whether the applicable statutory language is unconstitutionally vague or overbroad is similarly insubstantial under this Court's

previous decisions. The text of the statute, of which the challenged provision is a part, is set forth at 2, *supra*. A cursory perusal of that statute makes it plain that, far from regulating the expression of ideas or inhibiting pure speech, its pervading theme is the regulation of unlawful sexual conduct and verbal acts in public calculated to solicit such conduct. As has already been demonstrated, *supra*, sodomy solictations made in public may be proscribed without running afoul of the Constitution. And since this Court's decisions establish that, where, as here, a statute does not involve First Amendment freedoms, the vagueness challenge must be limited to an examination of the conduct in the particular case involved, petitioners' vagueness challenge is likewise ineffectively advanced. See *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974). This is especially so because the sodomitic proposals charged here rationally fall within the hard core of the statute's proscription. Cf. *Parker* v. *Levy*, *supra*, 417 U.S. at 755-756.

This Court's recent decisions also establish that petitioners' overbreadth challenge presents no substantial question calling for issuance of the requested writ. Application of the overbreadth doctrine has been invoked by this Court "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). Facial invalidation under that doctrine is clearly not in order when, as here, the challenged statute is essentially concerned with conduct and does not have a substantial and real deterrent effect on pure speech or legitimate expression. Id. at 612-615; *Erzonznik* v. *City of Jacksonville*, *supra*, 45 L. Ed. 2d at 135. In addition, a limiting construction of a statute which excludes from its coverage constitutionally protected speech obviates any question of overbreadth. *Colten* v. *Kentucky*, 407 U.S. 104, 111 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134, 162

(1974). The narrowing construction placed on the challenged language by the District of Columbia Court of Appeals (App. 8a-10a) manifestly serves that purpose.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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